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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 505

INSTITUTO CUBANO DE ESTABILIZACION DEL AZUCAR,

Petitioner,

v.

T/V "GOLDEN WEST";
SKIBS A/S "GOLDEN WEST",

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT SKIBS A/S "GOLDEN WEST" IN OPPOSITION

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CASES:

Marine Transit Corp. v. *Dreyfus*, 284 U. S. 263 — 5

Son Shipping Co., Inc. v. *DeFosse & Tanghe*, 199 Fed. 2d 687 — 6, 8, 9

STATUTE:

Carriage of Goods by Sea Act, 46 USC, sec. 1300; sec. 1303(6) — 2, 4, 10

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Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a) is reported in 246 Fed. 2d 802, and in 1957 AMC. 1481. The opinion of the United States District Court for the Southern District of New York is reported in 128 Fed. Supp. 754, and in 1956 AMC. 704.

Statutes Involved

Petitioner refers (Pet. p. 3) to the Harter Act, and prints 46 USC. Sec. 190 at page 17a of its appendix. The Harter Act is in no way involved in this case in which there

was a shipment from a foreign to a United States port, governed exclusively by the Carriage of Goods by Sea Act, 46 USC. sec. 1300 (Pet. App. 18a).

Petitioner's Appendix

Petitioner has not printed the libel which was the subject of this litigation and which was dismissed by the courts below. It does print (Pet. App. 14a) an "Arbitration Clause" which was attached to the libel, without stating, however, that this clause is contained in a charter made between petitioner and Transocean Shipping & Trading Company, to which charter this respondent was not a party. The said charter was not put in evidence by petitioner.

Questions Presented

1. Whether a shipowner can be judicially compelled to arbitrate a claim for cargo damage although he had made no contract or agreement, by charter or otherwise, to arbitrate with anyone.

2. Whether a clause in a sub-charter, incorporated into a bill of lading, providing that disputes between the *sub-charterer* and a shipper should be arbitrated, can be turned into an agreement that the *shipowner* will arbitrate with the shipper, although there was no contractual relation between the sub-charterer and the shipowner.

3. Whether a shipper, whose only right against a shipowner is based upon bills of lading for the carriage of cargo in foreign trade to a United States port, can claim exemption from the one-year time limitation to bring suit contained in the Carriage of Goods by Sea Act (46 USC. sec. 1303 (6); Pet. App. 19a).

Statement

In the courts below, as here, petitioner has avoided setting down a clear and complete statement of the facts. The facts as found by Judge Bicks in the District Court (Pet. App. 8a) are as follows:

1. On May 24, 1949, respondent chartered its tank vessel "Golden West" to Overseas Commodex Corporation, and this charter was renewed on May 16, 1951, for a period of three years, one and one-half months. By this charter the whole capacity of the vessel was chartered to Overseas Commodex Corporation and the master was to sign bills of lading as directed by the charterer.

2. Apparently Overseas Commodex Corporation subchartered the vessel to Transocean Shipping & Trading Company, for on April 17, 1952, while the vessel was still under long-term charter to Commodex, this petitioner made a charter with Transocean Shipping & Trading Co. for a voyage of the vessel from Cuban to United States ports.

3. Respondent at no time entered into any charter with petitioner, and had no relationship of any kind with Transocean Shipping & Trading Company. The insinuations throughout petitioner's brief, particularly at page 7, that Transocean was a "secret agent" of the Shipowner are entirely without justification in the record or the findings of the District Court.

4. On December 8, 1953, some eighteen months after the completion of the voyage on which the alleged loss occurred, petitioner filed a libel in the United States District Court for the Southern District of New York against the vessel and respondent, alleging short delivery of cargo at Albany in May, 1952. The only specific demand in the libel was for arbitration under a clause in the charter the libelant (petitioner) had made with Transocean Shipping & Trading Company.

5. In March 1955, Judge BICKS denied, upon argument and written briefs, petitioner's motion under Section 8 of the United States Arbitration Act to compel respondent to submit to arbitration for the reasons set out in his opinion (Pet. App. 8a). He held that the libel could not be dismissed because the prayer in the libel for "other and further relief" could support a claim against the vessel owner for cargo loss or damage.

6. Following this decision, for the first time libelant (petitioner) asserted a right to recover its alleged loss from respondent under the law relating to ocean carriers. Since it appeared on the face of the libel that it was filed more than one year after the discharge of the cargo, at which time the claim arose, respondent filed exceptions on the ground that it was discharged from all liability under Section 3(6) of the Carriage of Goods by Sea Act, and in May 1956 Judge MURPHY sustained the exceptions and dismissed the libel.

7. The decisions of both District Judges were unanimously affirmed by the Court of Appeals.

It is evident from the above that when this alleged claim arose there were various legal remedies open to petitioner: it could have brought suit against Transocean Shipping & Trading Company on the contract of carriage evidenced by the charter; it could have claimed the right of arbitration against Transocean Shipping & Trading Company with whom it alleged that it made a charter for the transport of its cargo, which charter contained an arbitration clause; it could have brought suit under the bills of lading, within one year after the discharge, against Transocean Shipping & Trading Company, and against the Golden West and the respondent.

Instead of asserting these rights, libelant allowed the matter to rest for eighteen months and first asserted its claim on December 8, 1953. For some unexplained reason it did not claim under its charter against Transocean. As

against respondent, it was forced to contend that its agreement to arbitrate with Transocean constituted an agreement to arbitrate by respondent, or that the law applicable to suits under bills of lading was not to be applied to its particular claim. Naturally, it failed to persuade the courts below that these positions were tenable.

Argument

Petitioner's first reason for the allowance of a writ (Pet. p. 9) is that the denial of arbitration below is "irreconcilable with the applicable decisions of this Court".

Neither this Court, nor any other court so far as we can determine, has ever been asked to compel a party to arbitrate where he had made no agreement for arbitration. Petitioner does not, and can not, cite any decision of this Court, or of any lower court, holding a ship-owner bound to arbitrate a claim for cargo damage because there was an arbitration clause in a charter to which the ship-owner was not a party.

No such question was involved in *Marine Transit Corp.* v. *Dreyfus*, 284 U. S. 263, cited by petitioner (Pet. p. 10), for in that case there was, as this Court said at page 269, "no question that the controversy between the petitioner and the respondent was within the arbitration clause of *the booking contract*"—*a contract made between petitioner* and respondent.

Throughout its argument petitioner attempts to make Transocean Shipping & Trading Co., which it refers to as "the shipping company", a mere agent of respondent, and treats the act of the master in signing bills of lading as if it amounted to an assumption by the ship-owner of the obligations of the charter, relieving the actual charterer of all responsibility thereunder. At page 11 petitioner says that respondent adopted the charter for "respondent's per-

formance", and "accepted the promised fruits" of the charter as the "price of performing it". Nothing could be further from the fact.

The purpose of issuing these order bills of lading was to acknowledge receipt of the cargo on board the vessel, and to bind the vessel and her owner to the proper carriage and delivery of that cargo, thereby providing negotiable shipping documents for commercial use. But by this customary procedure the ship-owner did not take over the performance of the charter made by Transocean Shipping & Trading Co. That charter remained a separate document binding on the parties thereto. The only "fruits" the ship owner obtained were his payments of hire from Overseas Commodex Corp. under the long-term time charter, arranged for years prior to the voyage in question. The fruits of that voyage went to Transocean in the payment of freight.

The charter entered into between Transocean Shipping & Trading Co. and petitioner (which petitioner failed to put in evidence) presumably contained provisions for commencement and termination, for the loading, stowage, carriage and discharge of cargo, for payment of freight, lay days, etc. Disputes under all these provisions were subject to arbitration, and the terms were incorporated into the bills of lading so that any holder thereof (these were order bills) would have notice of and be bound by or could take advantage of such terms (*Son Shipping Co. Inc.* v. *DeFosse & Tanghe*, 199 Fed. 2d 687). Instead of taking advantage of its right to arbitrate its claim for cargo loss and damage against Transocean, petitioner contends that because Transocean agreed to arbitrate, and such agreements was incorporated in the bills of lading, the ship-owner must be held to have agreed to arbitration.

The bills of lading incorporate the terms of the charter of April 17, 1952, made by petitioner with Transocean Shipping & Trading Co. One of the terms so incorporated in

the bills of lading was for arbitration of disputes under that charter, that is, disputes between the *chartered owner, Transocean,* and the charterer petitioner.

What the courts below refused to do was to translate or rewrite this provision into an agreement that disputes between the shipowner and the petitioner should be arbitrated.

The Court of Appeals said on this point (Pet. App. 5a), 246 F. 2d 802, 804—

> "If the libelant desired to submit its claims of shortage to arbitration, it should have served its demand upon Transocean, with whom it had its arbitration agreement. The charter party incorporated into the contract for carriage evidenced by the bills of lading so provided and cannot be reasonably read to provide otherwise".

This decision is not "irreconcilable" with any decision of this or any other Court.

At page 10 the petition suggests that the decision below will impair many outstanding contracts. To set up its argument, reference is made to cases of assignments of contracts, or where "an immediate promisor has assumed all the obligations of the original promisor" (p. 13). This is a complete distortion of the ordinary situation of the issuance of bills of lading for the carriage of cargo arranged for under a subcharter.

The decision below does not impair any contract. To the contrary, it affirms the right of the shipper to arbitrate with the party with whom it contracted for arbitration, that is, the charterer. It affirms the right of a ship-owner to contract for the use of his vessel under long-term time charter in foreign trade, without being bound by contractual obligations to which he did not agree and of which he had no knowledge. To hold as petitioner demands would be for

the court to impair the ship-owner's contract and place an impossible burden on the chartering of vessels.

One of the difficulties for the ship-owner which would be created by the decision sought here by petitioner is indicated by the Court of Appeals opinion in *Son Shipping Co.* v. *DeFosse & Tanghe*, 199 Fed. 2d 687. In that case the ship-owner had contracted for arbitration (*contra* this case, as pointed out by the decision below, Pet. App. 5a). The Court of Appeals in the Son Shipping Case held that the one-year time limit to sue did not apply to arbitration agreements and at the end of its opinion at page 689 said:

> "We are aware that the time within which arbitration may be demanded may be of great importance to the parties who have by contract agreed to have their differences so determined, especially to a ship-owner, but unless they see fit to condition their agreement by an express time limitation, a demand within a reasonable time, as here, is not barred."

Certainly a ship owner would have no possibility of protecting himself by an express time limitation, if he were held bound by arbitration agreements to which he is not a party and of which he has no knowledge.

The petition at page 13 says that the decision below "vexes the future administration of state arbitration laws in both the state and the Federal courts". Again, no case in a state court holding a party bound to arbitrate who had not made an agreement for arbitration is cited. The argument appears to be that a state court might make such a decision, in which case it would find itself in opposition to the holding in this case. In the very unlikely event of a state court considering such a decision as petitioner indicates, we suggest that it would not vex but would prove most advantageous if such court were bound by the present decision.

When it is understood that the agreement incorporated in the bills of lading in this case was an agreement by a separate entity, Transocean Shipping & Trading Co., to arbitrate, and was not an agreement by the ship-owner respondent to arbitrate, all the arguments of the petition eliminate themselves, and the decision below is the only possible one consistent with both Federal and State Arbitration Statutes.

The point is clearly stated in the District Court's opinion (Pet. App. 10a), in distinguishing *Son Shipping Co.* v. *DeFosse & Tanghe*, 199 Fed. 2d 687, on which case petitioner relied in the courts below. The District Court said—

> "That case is not authority for libelant's position. There the owner had agreed *in the charter party incorporated in the bill of lading* to arbitrate all disputes arising therefrom; here the owner was not a party to the charter agreement referred to in the bills of lading and indeed may well have been in complete ignorance thereof except through the reference in the bills of lading."

Having argued up to this point that the bills of lading bound the ship-owner to arbitration, the petitioner at page 15 now argues that after all the bills of lading were not controlling documents, and therefore its claim was not subject to the time limitation in the Carriage Of Goods By Sea Act.

Petitioner cites cases holding that the Harter Act did not apply to bills of lading issued by a charterer to a shipper where such bills were intended to be a mere receipt for the shipment, and the terms of the charter for the whole capacity of the vessel were intended to govern the relations between charterer and shipper. Petitioner refers to commentators who have concluded that in such situations the Carriage Of Goods By Sea Act would not apply.

These cases and comments have no bearing upon the situation in this case. The bills of lading in this case were

not mere receipts, but were the only evidence of contracts of carriage made by respondent. The only rights which petitioner has against respondent are based upon these bills of lading. The terms of the charter of April 17, 1952 are involved in this case as against respondent only as they are incorporated in and made part of the bills of lading. These were order bills and could have been sold and transferred making respondent liable to three different holders. To these contracts the Act applies by its own provisions, and under the Act the carrier and the ship are discharged from all liability. The Carriage Of Goods By Sea act (46 USC, Sec. 1300) provides—

> "Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have affect subject to this chapter . . . ".

And Section 1303 (6) provides in part—

> "In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."

The point here made by petitioner was argued upon written briefs before the District Court, and was dismissed without opinion. The Court of Appeals said (Pet. App. 6a), "We see no merit whatever to this contention".

CONCLUSION

It is respectfully submitted that the petition herein should be denied.

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Counsel for Respondent.

October 23, 1957.